MOTION FILED
JUN 14 1985

(5)

No. 84-1559

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

UNITED VAN LINES, INC.,
Petitioner,
v.
JAMES K. T. HUNTER
and
GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN MOVERS CONFERENCE AS *AMICUS CURIAE*

JAMES A. CALDERWOOD *
JOSEPH MICHAEL ROBERTS
ROBERT R. HARRIS
GROVE, JASKIEWICZ, GILLIAM and COBERT
1730 M Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-2900
Counsel for Amicus Curiae American Movers Conference

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1559

UNITED VAN LINES, INC.,
Petitioner,

v.

JAMES K. T. HUNTER

and

GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF AMERICAN MOVERS CONFERENCE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Movers Conference (hereinafter "AMC") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petition For Writ of Certiorari of United Van Lines, Inc. The consent of the respondents was refused. AMC has not been a participant in this case prior to this filing as *amicus curiae.*

The AMC is the national trade association for the household goods moving industry. Most of its members are common carriers providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Subchapter II of Chapter 105 of Title 49 United States Code. As such, these household goods common carriers and the AMC, as their trade association,

are directly affected by decisions of the courts which interpret the scope of the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11916 (1982), particularly the standard of liability for common carriers providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission, as set forth in section 11707.

If the decision of the United States Court of Appeals for the Ninth Circuit is not reversed, then the household goods common carriers regulated by the Interstate Commerce Commission will be subject to conflicting interpretations of the scope of section 11707 and, most importantly, will be subject to the diverse and sometimes conflicting laws of the various states in the performance of their federally regulated transportation obligations. In addition, if the decision of the Ninth Circuit is not reversed, access to the federal courts by both shippers and carriers will be restricted beyond the intentions of Congress and this Court.

The Ninth Circuit violated clear standards set forth in previous decisions of this Court by restricting the scope of liability imposed on federally regulated common carriers by section 11707 to only physical damage to the cargo transported. This decision, if not reversed, will be binding precedent upon many shippers and carriers, many of whom are AMC members, who seek the protection and uniform application of the liability standard of section 11707.

The Ninth Circuit also failed to address whether independent federal subject matter jurisdiction exists when a plaintiff alleges a cause of action based upon 49 U.S.C. § 11711. Since a federal court, at any time, may consider the existence of federal subject matter jurisdiction, this issue should be resolved by this Court, notwithstanding the apparent failure of the courts and parties below specifically to address or resolve the issue.

These issues are of very real importance to the questions involved and therefore to all household goods carriers subject to the Revised Interstate Commerce Act. The interests of justice would not be served unless these legal issues were considered by this Court because their impact is far-reaching.

Accordingly, it is respectfully requested that leave to file the attached brief *amicus curiae* on behalf of the AMC be granted.

Respectfully submitted,

JAMES A. CALDERWOOD *
JOSEPH MICHAEL ROBERTS
ROBERT R. HARRIS
GROVE, JASKIEWICZ, GILLIAM
and COBERT
1730 M Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-2900
Counsel for Amicus Curiae
American Movers Conference

* Counsel of Record

Date: June 14, 1985

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	2
I. The United States Court of Appeals for the Ninth Circuit Violated Clear Standards of This Court By Holding That Section 11707 Imposes Liability On a Federally Regulated Common Carrier Only to the Extent of the Physical Damage to the Cargo Shipped Under the Bill of Lading	2
A. The Liability Imposed Upon Federally Regulated Common Carriers By Section 11707 Preempts All State and Common Law Actions Which are Inconsistent With Section 11707	3
B. In Light of the Virtually Complete Preemption of State and Common Law Claims By Section 11707, A Reviewing Court Must Address Each and Every Claim for Relief Asserted by Plaintiffs to Determine Whether They Arise Under Section 11707	7
II. The District Court Had Independent Removal Jurisdiction Over the Complaint Based Upon Section 11711	13
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Adams Express Co. v. Croninger, 226 U.S. 491 (1913) 3, 4, 6
Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985) 2, 3, 16
American Synthetic Rubber Corp. v. Louisville & N.R.R., 422 F.2d 462 (6th Cir. 1970) 8
American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) 14
Bell v. Hood, 327 U.S. 678 (1946) 15
F. J. McCarty Co. v. Southern Pacific Co., 428 F.2d 690 (9th Cir. 1970) 11
Fulton v. Chicago, R.I. & P.R.R., 481 F.2d 326 (8th Cir. 1973) 8
George R. Hall, Inc. v. Superior Trucking, Inc., 514 F. Supp. 581 (N.D. Ga. 1981) 8
Georgia, F., & A. Ry. v. Blish Milling Co., 241 U.S. 189 (1916) 8
Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903) 10
Gully v. First National Bank, 299 U.S. 109 (1936) .. 15
Hector Martinez and Co. v. Southern Pacific Transportation Co., 606 F.2d 106 (5th Cir. 1979) 11
J. & H. Flyer, Inc. v. Pennsylvania Railroad, 316 F.2d 203 (2d Cir. 1963) 11
Kansas City Southern Railway v. Carl, 227 U.S. 639 (1913) 6
L.E. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F.2d 488 (10th Cir. 1964) 11
New York, Philadelphia, & Norfolk R.R. v. Peninsula Produce Exchange of Maryland, 240 U.S. 34 (1916) 6
Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 14
Pennsylvania R.R. v. Hughes, 191 U.S. 477 (1903) .. 4
Reed v. Lambert, 674 F.2d 1032 (5th Cir. 1982) .. 15
Rules, Regulations, and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515 (1972) 12

TABLE OF AUTHORITIES—Continued

	Page
Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936)	8
Southern Express Co. v. Byers, 240 U.S. 612 (1916)	7, 10
The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913)	14
Acts and Statutes:	
Act of October 17, 1978, Pub. L. 95-473, § 3(a), 92 Stat. 1337	4
Hepburn Rate Act of 1906, ch. 3591, § 7, 34 Stat. 595	2
Labor Management Relations Act of 1947, ch. 120, § 301, 61 Stat. 156	2
Revised Interstate Commerce Act, 49 United States Code §§ 10101-11916 (1982)	1, 2, 10
28 United States Code § 1331 (1982)	14
28 United States Code § 1337 (1982)	2, 13, 14
28 United States Code § 1441 (1982)	3, 14
49 United States Code § 20(11)	2, 4
49 United States Code § 11707 (1982)	*passim*
49 United States Code § 11711 (1982)	13, 14, 16
Regulations:	
49 C.F.R. § 1005 (1984)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1559

UNITED VAN LINES, INC.,
Petitioner,

v.

JAMES K. T. HUNTER

and

GINA F. BRANDT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMERICAN MOVERS CONFERENCE AS *AMICUS CURIAE*

American Movers Conference, as *amicus curiae*, supports the position of United Van Lines, Inc., petitioner.

STATEMENT

The American Movers Conference is the national trade association for the household goods moving industry. Most of its member motor carriers possess operating authority from the Interstate Commerce Commission to engage in the interstate transportation of household goods as motor common carriers. As such, these carriers are subject to the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11916 (1982), and are regulated by the Interstate Commerce Commission. In particular, these carriers are subject to the liability standard established by Congress and currently codified at 49 U.S.C. § 11707

(1982).[1] The uniform interpretation and application of the liability standard in section 11707 is of utmost significance to these carriers. Moreover, these carriers consider it of great important to have available to them the jurisdiction of the federal courts in disputes where the scope of liability of these carriers under section 11707 and other provisions of the Revised Interstate Commerce Act are at issue.

The AMC has not been a participant in this case prior to this filing as *amicus curiae*.

ARGUMENT

I. The United States Court of Appeals for the Ninth Circuit Violated Clear Standards of This Court By Holding That Section 11707 Imposes Liability on a Federally Regulated Common Carrier Only to the Extent of the Physical Damage to the Cargo Shipped Under the Bill of Lading.

Under the guise of considering the effect of the $10,000 jurisdictional minimum established at 28 U.S.C. § 1337(a) (1982) for actions brought under section 11707, the Ninth Circuit engaged in a lengthy and detailed discussion of the scope of the doctrines of federal preemption,[2] artful pleading, pendant jurisdiction and

---

[1] Congress first enacted a statute governing the liability of federally regulated common carriers in 1906. Hepburn Rate Act of 1906, ch. 3591, § 7, 34 Stat. 595 (originally codified at 49 U.S.C. § 20(11), recodified without substantial changes at 49 U.S.C. § 11707 (1982)). This provision is commonly referred to as the "Carmack Amendment."

[2] This Court very recently applied the federal preemption doctrine in determining whether the tort of bad faith handling of insurance claims, recognized by Wisconsin state courts, was preempted by a federal claim arising under section 301 of the Labor Management Relations Act of 1947, ch. 120, § 301, 61 Stat. 156 (codified at 29 U.S.C. § 185(a) (1982)). Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985) (hereinafter *Allis Chalmers*). The Ninth Circuit did not have the benefit of this decision.

aggregation of claims. However, the court overlooked critical factors in deciding that the jurisdictional minimum was not satisfied.

The Ninth Circuit too quickly determined that the plaintiffs' claim for damages arising under section 11707 was limited to approximately $2,500 in cargo damages. The second major error of the Ninth Circuit was in considering the remaining causes of action of the plaintiffs to be "state claims." A review of the Complaint will show that they were not necessarily state claims, nor did the plaintiffs even allege that they were state claims. The Ninth Circuit should have more thoroughly addressed the origins of each claim for relief. The claims for relief which are properly attributed to a cause of action arising under section 11707 satisfactorily meet the $10,000 jurisdictional minimum. As such, the District Court properly had removal jurisdiction of the Complaint under 28 U.S.C. § 1441(a) (1982).[3]

A. The Liability Imposed Upon Federally Regulated Common Carriers By Section 11707 Preempts All State and Common Law Actions Which Are Inconsistent With Section 11707.

Congress has preempted all state and common law causes of action which come within the parameters of the liability regimen established in section 11707.[4] This liability regimen was first imposed by Congress upon federally regulated common carriers in 1906.[5] Prior to

---

[3] AMC presumes that the lower courts will, upon remand, determine which claims arise under section 11707 and which claims do not. Once that determination is made, then the lower courts can determine, in light of this Court's decision in *Allis Chalmers*, whether the non-section 11707 claims are preempted. The issues addressed by AMC relate exclusively to whether the district court had removal jurisdiction to entertain the suit.

[4] Adams Express Co. v. Croninger, 226 U.S. 491 (1913).

[5] *See supra* note 1 and accompanying text.

that time, such carriers were subject to the various and disparate policies and statutes of the states.[6] However, once the Carmack Amendment was enacted, the states' authority over the liability of interstate carriers ended. This Court has extensively treated the preemption of state authority over common carrier liability, noting:

> That the [1906] legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist.

Adams Express Co. v. Croninger, 226 U.S. 491, 505-06 (1913).

The next question logically is what liabilities are imposed upon common carriers by the Carmack Amendment. The original statute[7] (49 U.S.C. § 20(11)) stated

---

[6] *See, e.g.*, Pennsylvania R.R. v. Hughes, 191 U.S. 477 (1903).

[7] The language of section 11707 is slightly different than the language which was contained in the original statute and codified at section 20(11). Section 11707 states that the liability imposed is for "the actual loss or injury to the property." Section 20(11) stated that the liability imposed was for "any loss, damage, or injury to such property." Section 3(a) of Pub. L. 95-473, 92 Stat. 1337 (1978), provided that in recodifying the provisions of the Interstate Commerce Act, including section 20(11), no substantive change in those provisions was intended by the recodification. The recodification substituted the word "injury" for "damage, or

that the subject carrier "shall be liable to the lawful holder [of the bill of lading] for any loss, damage, or injury to such property [received by the carrier and] caused by it or by any common carrier [transporting the property]." In *Hunter II*, the Ninth Circuit held that section 11707 liability extended only to damage to the cargo transported. *See* Appendix A-9 and A-30 to Petition for Writ of Certiorari of United Van Lines, Inc. (United).[8] The remaining damages alleged by the plaintiffs were held by the Ninth Circuit to arise under "state claims" [9] and not under section 11707. These holdings are in clear violation of interpretations of this Court and other courts as to the scope of damages available to injured parties under section 11707. Properly interpreted, most, if not all, of the damages alleged by plaintiffs arise under section 11707 and their amount exceeds the $10,000 jurisdictional minimum.

In enacting the Carmack Amendment, Congress did not establish a new liability regimen for common carriers:

> In speaking of the "liability" imposed by the [Carmack Amendment], we said, in the Croninger Case, that "the statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to

---

injury" as being more inclusive. Since the decisions of this Court interpreting the scope of the Carmack Amendment discuss section 20(11), AMC is setting forth the language of section 20(11), rather than section 11707, in the text.

[8] All references to appendices in this brief are to the appendices contained in United's Petition for Writ of Certiorari and will be identified as "Appendix ——-——."

[9] As noted above, *see supra* text accompanying note 3, the plaintiffs' Complaint did not characterize these claims for relief as arising under state statutes, state common law, federal common law or federal statutes.

> carriers has been interpreted by this court as well as many courts of the states."

Kansas City Southern Railway v. Carl, 227 U.S. 639, 649 (1913). This Court previously noted in *Croninger*:

> The duty to issue a bill of lading, and the liability thereby assumed, are covered in full . . .
>
> . . . The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered;" and plainly implies a liability for some default in its common-law duty as a common carrier.
>
> . . . .
>
> . . . The rule of the common law did not limit [a common carrier's] liability to loss or damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy.

226 U.S. at 506, 509. Recovery for physical cargo damage is not the exclusive remedy available under the Carmack Amendment. In *New York, Philadelphia, & Norfolk Railroad v. Peninsula Produce Exchange of Maryland*, 240 U.S. 34, 38 (1916), this Court held that a shipper could recover for business losses suffered by mere delay to the shipment and stated:

> The words "any loss, damage, or injury to such property," caused by the initial carrier or by any connecting carrier, are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural, in view of the general purpose of the statute, to take the words "to the property" as limiting the word "damage" as well as the word "injury" and thus rendering the former wholly superfluous.

Clearly, the liability imposed by section 11707 extends to all loss, damage, or injury which is caused by a fail-

ure of the carrier to perform the obligations arising under the bill of lading and imposed by the common law due to its nature as a common carrier. This rule is evident from this Court's discussion in *Southern Express Co. v. Byers*, 240 U.S. 612 (1916). Interpreting the scope of the Carmack Amendment, this Court noted:

> Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common-law principles accepted and enforced by the Federal courts.
>
> . . . .
>
> The action is based upon a claim of mental suffering only,—nothing else was set up and the proof discloses no other injury for which compensation has not been made. In such circumstances as those presented here, the long-recognized common-law rule permitted no recovery; the decisions to this effect "rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation." Cooley, Torts 3d ed. page 94. The lower Federal courts, almost without exception, have adhered to this doctrine, and in doing so we think they were clearly right upon principle and also in accord with the great weight of authority.

240 U.S. at 614-5. The Court adhered to the Federal rule denying recovery for mental pain without proof of other injury, although it noted that the states had split widely on this issue. *Id.* at 616.

B. In Light of the Virtually Complete Preemption of State and Common Law Claims by Section 11707, A Reviewing Court Must Address Each and Every Claim for Relief Asserted by Plaintiffs to Determine Whether They Arise Under Section 11707.

The Ninth Circuit did not analyze correctly whether the jurisdictional minimum was met by plaintiffs' Complaint. The clear standards of this Court require a re-

viewing court to address each claim for relief to determine whether it arises in connection with section 11707, the bill of lading and common law principles of common carrier liability.[10] The reviewing court should not accept at face value the designation by plaintiff of the statutory or common law basis for the cause of action, but instead should independently assess the cause of action. In this instance, the court noted the plaintiffs did not characterize their claims as arising under section 11707 and apparently accepted the plaintiffs' arguments on appeal that their intentions were to base the claims upon California law. This was the mistake of the Ninth Circuit. While a plaintiff normally may have the option of selecting his remedy and being the "master of his complaint," that option is nonexistent if the claim arises under section 11707. In that instance, he has no state remedy and he is enslaved to his federal remedy. An independent review of plaintiffs' Complaint clearly shows that several, if not all, of the claims for relief arise under section 11707.

The Complaint filed by the plaintiffs leaves much to be desired in terms of brevity and clarity in its claims for relief. Ignoring the titles placed by plaintiffs upon their claims, they can be described as follows. First, plaintiffs request relief for the actual value of the damage done to the household goods and antiques which were the subject of the transportation by United. Plaintiffs put a value "in excess of $2,500" for this damage. They seek

---

[10] *See* Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28 (1936); Georgia, F., & A. Ry. v. Blish Milling Co., 241 U.S. 189 (1916) (shipper sued only in trover; court held shipper's exclusive remedy was under Carmack Amendment). *See also* American Synthetic Rubber Corp. v. Louisville & N.R.R., 422 F.2d 462 (6th Cir. 1970); Fulton v. Chicago, R.I. & P.R.R., 481 F.2d 326 (8th Cir. 1973); George R. Hall, Inc. v. Superior Trucking, Inc., 514 F. Supp. 581 (N.D. Ga. 1981). This function is all the more appropriate when, as in this case, the plaintiffs did not specify in their Complaint whether their claims arose under state or federal law.

relief against United for this damage because of United's alleged breach of its obligations to plaintiffs under the contract and section 11707. *See* Paragraphs 22-23 of the Complaint (Appendix L-8).

Second, plaintiffs seek $50,000 as damages for the emotional distress allegedly caused by United (and its employees and agents) to Ms. Brandt in damaging an antique brass baby crib when United supposedly knew, prior to the transportation of the crib, that Ms. Brandt was pregnant and was extremely anxious that the crib arrive at destination without injury. *See* Paragraph 30(b) (Appendix L-18). The basis for this second claim for relief, according to plaintiffs, is that United breached the covenant of good faith and fair dealing which was implied in the bill of lading. *See* Paragraph 28 (Appendix L-9).

The third item of damage alleged by plaintiffs is identified as "in excess of $3,000," and represents the attorney's fees which the plaintiffs had expended, prior to filing the Complaint, in seeking payment for the damage done to the household goods. *See* Paragraph 30(c) (Appendix L-18). The basis for this damage, according to plaintiffs, is United's breach of the covenant of good faith and fair dealing which is implied in the bill of lading. *See* Paragraph 28 (Appendix L-9).

The fourth item of damages sought by plaintiffs relates to punitive damages against United in the amount of $5,000,000.00. *See* Paragraph 31 (Appendix L-18 and 19). These damages are sought due to an alleged breach of the covenant of good faith and fair dealing implied in the bill of lading, which breach was purportedly committed with a conscious disregard of the rights of plaintiffs by means of intentional misrepresentations, deceits and concealments of material facts allegedly known to United, with the intention of thereby depriving plaintiffs of their legal rights. *Id.*

Plaintiffs further alleged that all of the damages set forth above (except attorney's fees) were separately caused by certain fraudulent and false misrepresentations of United (or its agents or employees) relating to the services and benefits which plaintiffs were to receive by payment of a specific tariff rate. *See* Paragraphs 35-41 (Appendix L-20-22).

Fifth, plaintiffs alleged that they suffered emotional harm in the amount of $50,000.00, and requested similar punitive damages, due to the defendants' outrageous, oppressive, fraudulent and malicious actions in settling the filed claim of plaintiffs. *See* Paragraph 42-46 (Appendix L-22-25).

Each claim of plaintiffs is in connection with a duty or obligation which United owes to plaintiffs as a result of the bill of lading, its common law common carrier obligation, section 11707 and regulations of the Interstate Commerce Commission imposed on carriers under authority delegated to it by Congress in the Revised Interstate Commerce Act. As a result, each and every claim for relief of plaintiffs arise under section 11707.[11]

Plaintiffs' second allegation of damage, emotional harm to Ms. Brandt, is simply special damages available under the bill of lading. The law on special contract damages is settled, this Court having declared that "a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract." *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903). This rule of reasonable foreseeability has been applied by many courts in assessing damages based upon

---

[11] A separate question for the lower court is whether federal law authorizes the relief which plaintiffs request. *See* Southern Express Co. v. Byers, 240 U.S. 612 (1916). However, this issue sh d be addressed after the court makes the determination whether the relief requested arises under breaches of common carrier duties imposed by section 11707, the bill of lading and federal common law.

section 11707. The Fifth Circuit, in considering whether special damages should be assessed against a common carrier for failure to perform the obligation under the bill of lading, held that federal law controls its determination of liability and the measure of damages, although federal law adopts common law principles. *See Hector Martinez and Co. v. Southern Pacific Transportation Co.*, 606 F.2d 106, 108 (5th Cir. 1979). *See also F.J. McCarty Co. v. Southern Pacific Co.*, 428 F.2d 690, 693 (9th Cir. 1970); *L.E. Whitlock Truck Service, Inc. v. Regal Drilling Co.*, 333 F.2d 488, 491 (10th Cir. 1964); *J. & H. Flyer, Inc. v. Pennsylvania Railroad*, 316 F.2d 203, 205 (2d Cir. 1963). Since the plaintiffs have alleged that the emotional harm suffered by Ms. Brandt was a result of United's breach of the covenant of good faith and fair dealing contained within the bill of lading, ordinary rules of contract interpretation relating to special damages should apply. Clearly, the $50,000.00 emotional distress allegedly caused to Ms. Brandt comes within the purview of special damages available under section 11707.

The damages allegedly suffered by plaintiffs pursuant to "bad faith" settlement by United also arise under section 11707. The contract which plaintiffs and United signed is commonly referred to as the Uniform Household Goods Bill of Lading. The applicable terms of the bill of lading have been included as Appendix M of United's Petition for Writ of Certiorari. The bill of lading contains the conditions, rights, duties and obligations of both parties in filing, processing and satisfying claims which relate to the transportation of goods covered by the bill of lading. Not only are these obligations of United extensively covered in the bill of lading, they are imposed upon United by the Interstate Commerce Commission.[12] The Commission assumed jurisdiction over procedures for claims and claims processing based upon its delegated au-

---

[12] *See* 49 C.F.R. § 1005 (1984).

thority from Congress to regulate interstate transportation. The Commission has held:

> Claims arise in and out of the performance of the transportation service provided by carriers, and the fact that most or all of the paper work related thereto and the formal demand for recompense follows delivery is of no consequence. It is the misfeasance or nonfeasance in the actual performance by carriers of the transportation service that usually gives birth to claims for loss and damage, and the tendency of carriers to think that it is otherwise should, we think, immediately be arrested.
>
> As seen then, the processing of loss and damage claims constitutes an integral part of the total shipping and transportation service concerning which carriers should, under section 1(6) of the act and similar provisions in parts II, III, and IV of the act, establish reasonable regulations and practices. In view of this, and because the expeditious and just processing of loss and damage claims is essential to carrying out the national transportation policy to foster adequate, efficient, and economical transportation service, this Commission has the necessary jurisdiction and authority—and on the strength of this record, the conspicuous duty—to make and enforce regulations pertaining to the processing of loss and damage claims in addition to those which we have promulgated in the past.

Rules, Regulations, and Practices of Regulated Carriers With Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515, 545-46 (1972). The procedures set forth in the bill of lading relating to the filing, processing and satisfaction of claims are the identical procedures which the Interstate Commerce Commission has imposed upon all regulated common carriers. Therefore claims for relief based upon improper or fraudulent settlement actions by United are based upon breaches of obligations arising from the bill of lading and federal regulations. These breaches, whether or not intentional,

willful or malicious, cannot be disassociated from the bill of lading. As such, any consequential or special damages arising from "bad faith" settlement actions are clearly within the scope of section 11707.

The intentional, willful or malicious nature of the breach by United of these obligations is the basis for the punitive damages claim of plaintiffs. It will be a question for the lower courts whether punitive damages based upon a willful or malicious breach of contractual obligations are recoverable under federal law. For purposes of establishing the district court's removal jurisdiction, it is sufficient that the punitive damages are requested because of breaches of obligations arising under section 11707. In addition, the availability of punitive damages need not be addressed at this point due to the clear allegation of consequential and special damages arising from the breach by United of its obligations under section 11707 and the bill of lading. These consequential and special damages satisfy the $10,000 jurisdictional minimum set forth at 28 U.S.C. § 1337(a) for civil actions brought under section 11707.

II. The District Court Had Independent Removal Jurisdiction Over the Complaint Based Upon Section 11711.

Plaintiffs' sixth cause of action was brought under 49 U.S.C. § 11711 (1982). *See* Paragraphs 47-49 (Appendix L-25). This section provides shippers of household goods a federally guaranteed right to recover from motor carriers, in certain circumstances, attorney's fees which are incurred in a dispute concerning the transportation of household goods. Plaintiffs asserted this right as a separate cause of action in the Complaint and not merely as an adjunct to the remaining causes of action. Plaintiffs, therefore, have asserted a cause of action arising under a specific federal law. Whether this claim arises under an act of Congress regulating commerce or a law of the United States, federal jurisdiction exists independ-

ent of any claim under section 11707. *See* 28 U.S.C. § 1337(a); 28 U.S.C. § 1331.

As the Ninth Circuit observed, *see* Appendix A-13, this Court has long held:

> the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a "suit arising under" the patent or other law of the United States by his declaration or bill.

The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913). Plaintiffs' assertion of a federal claim, therefore, gave the District Court original jurisdiction under either 28 U.S.C. § 1331 or § 1337 and, consequently, removal jurisdiction under 28 U.S.C. § 1441(a), without any regard to the amount of damages. This jurisdictional ground is independent of section 11707 and is not affected by the $10,000.00 jurisdictional minimum which applies only to causes of action arising under section 11707. In short, there is no jurisdictional minimum for section 11711 causes of action.

Whether 49 U.S.C. § 11711 in fact creates a cause of action under which relief may be granted may be open to dispute. As alleged, it does satisfy the tests this Court has previously employed to determine the existence of cases arising under federal laws. The "title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). If plaintiffs proved each of their allegations incorporated in the sixth cause of action, they would also satisfy the creation test for federal causes of action in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916). Under the American rule concerning recovery of attorney's fees, the federal statute obviously is both basic and necessary to recovering the attorney's fees re-

quested and the claim clearly "hinges on" federal law. *Gully v. First National Bank*, 299 U.S. 109 (1936).

Whether plaintiffs would ever succeed on their sixth claim, or even whether such a cause of action exists, need not have concerned the Ninth Circuit or the District Court in deciding whether jurisdiction existed. This Court has held "where the Complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit." [13] *Bell v. Hood*, 327 U.S. 678, 681-82 (1946).

---

[13] The Court recognized only two exceptions. The first, a federal claim made solely for the purpose of obtaining federal jurisdiction, is completely inapplicable here because plaintiffs originally filed in state court. The other, the insubstantiality or frivolity of a claim, although never argued below, does not apply. Because plaintiffs alleged a nonfrivolous claim--that they were entitled to attorney's fees under 49 U.S.C. § 11711—the District Court had removal jurisdiction to consider the claim. Failure to state a proper cause of action would call for a judgment on the pleadings or merits after the court assumed jurisdiction, not a dismissal for want of jurisdiction. Bell v. Hood, 327 U.S. 678, 682 (1946); Reed v. Lambert, 674 F.2d 1032, 1035-36 (5th Cir. 1982).

CONCLUSION

This Court should grant the Petition For Writ of Certiorari, reverse the judgment of the Court of Appeals and remand the case with instructions that the court (1) determine which of the claims for relief asserted in the Complaint arise under section 11707, (2) if the $10,000 jurisdictional minimum for section 11707 is met, apply the preemption standard announced in *Allis Chalmers* to determine whether any non-section 11707 claims are preempted by section 11707, and (3) determine whether independent subject matter jurisdiction exists under 49 U.S.C. § 11711.

Respectfully submitted,

JAMES A. CALDERWOOD *
JOSEPH MICHAEL ROBERTS
ROBERT R. HARRIS
GROVE, JASKIEWICZ, GILLIAM
and COBERT
1730 M Street, N.W.
Suite 501
Washington, D.C. 20036
(202) 296-2900
Counsel for Amicus Curiae
American Movers Conference

* Counsel of Record

Date: June 14, 1985